

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

NEOMI POWELL,)	
)	
Claimant,)	IC 05-508489
)	
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
MANITO SUPER 1 FOODS, INC.,)	AND RECOMMENDATION
)	
Employer,)	
)	
and)	
)	filed September 11, 2006
IDAHO STATE INSURANCE FUND,)	
)	
Surety,)	
Defendants.)	
_____)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Coeur d'Alene on May 10, 2006. Claimant, Neomi Powell, was present in person and represented by Louis Garbrecht of Coeur d'Alene; Defendant Employer, Manito Super 1 Foods, Inc., and Defendant Surety, Idaho State Insurance Fund, were represented by Paul Augustine of Boise. The parties presented oral and documentary evidence. This matter was then continued for the submission of briefs, and subsequently came under advisement on July 11, 2006.

ISSUES

The issues to be resolved are:

1. Whether Claimant suffered an accident arising out of and in the course of her

employment;

2. Whether and to what extent Claimant is entitled to medical care; and
3. Whether and to what extent Claimant is entitled to temporary partial and/or temporary total disability benefits.

ARGUMENTS OF THE PARTIES

Claimant asserts she suffered an industrial accident on or about March 16, 2005, and that she is entitled to medical care and temporary disability benefits for her low back injury.

Defendants Employer and Surety contend that Claimant's account of an industrial accident is not credible and that she is not entitled to any benefits for her low back condition.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, David Powell, Mary Lou Wimmer (formerly Capaul), Peggy Wallace, and J. Strahan taken at the May 10, 2006, hearing;
2. Claimant's Exhibits 1 through 9 admitted at the hearing;
3. Defendants Employer and Surety's Exhibits A (excepting pp. 34-35 and 40-43), B, C (excepting pp. 46-47), D, and F through K admitted at the hearing; and
4. The pre-hearing deposition of Claimant taken on January 19, 2006.

After having considered all of the above evidence, and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. In January 2002, Claimant commenced working for Employer bagging groceries for customers, retrieving shopping carts, and answering customers' questions. In 2003, Claimant's

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duties changed and she became a bakery clerk answering phones, taking orders, packaging baked goods, arranging shelves, and cleaning up the baking area. Claimant subsequently learned how to fry donuts and make cookies. At times Claimant lifted 40 and 80-quart capacity mixing bowls, the largest of which weighed 33 pounds, with ingredients weighing an additional 30 to 40 pounds.

2. In March 2005, Claimant typically worked one of two shifts: from 10:00 a.m. to 6:00 p.m., or from 1:00 to 6:00 p.m. She was responsible for baking cookies as requested by her immediate supervisor Mary Lou Wimmer (formerly Capaul). Claimant's time cards establish that she did not work on March 1 or 15, 2005. On March 16, 2005, Claimant worked from 12:58 to 3:37 p.m., took a break, and then worked from 3:51 to 6:40 p.m.

3. Claimant testified that on March 16, 2005, she was lifting mixing bowls in and out of the dishwasher and making cookies. She testified that she felt a pinched nerve in her back. Claimant initially testified she either was lifting cookie sheets or lifting mixing bowls in and out of the dishwasher when she felt back pain. She also testified she first noticed back pain when she went out on break during her work shift.

4. Claimant testified that she told Wimmer, either March 16 or 17th, that she thought she had done something to her back like a pinched nerve from lifting at work. Claimant initially testified that she told Wimmer the day after she noticed back pain, because Wimmer was not working when Claimant hurt her back. Wimmer's time cards establish that she worked each day from March 15 through 19, 2005. On March 16, 2005, Wimmer worked from 8:56 a.m. until 5:08 p.m. Thus, Wimmer worked with Claimant for over an hour after Claimant's rest break on March 16, 2005.

5. Claimant testified that when she advised Wimmer she had hurt her back, Wimmer

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told her to stop doing things that made her back hurt and switch to other work activities. Claimant testified that she followed this counsel and did other things when her back hurt. After her alleged accident, Claimant had more back pain with certain activities and her foot occasionally went numb. She testified that she discussed these problems with Wimmer who told her to go see a doctor. Wimmer testified that Claimant first advised her of back pain on April 19, 2005.

6. Claimant took a spring break vacation from March 28 through April 5, 2005. She returned to work on April 6, 2005.

7. On April 18, 2005, Claimant presented to family nurse practitioner Julia Mangan. Mangan's report of the April 18 visit records Claimant's complaints of back pain but does not mention a work injury. Claimant testified she told Mangan that she had injured her back at work, but that Mangan reportedly said she did not get involved in workers' compensation matters.

8. Wimmer testified that Claimant first disclosed she hurt her back on April 19, 2005. Wimmer had Claimant fill out a work injury report. Claimant left the "date of injury" space blank, but recorded that she had notified her supervisor of the accident one and one-half months earlier. After completing the work injury report, Employer sent Claimant to the hospital for medical treatment.

9. On April 19, 2005, Claimant presented to the Kootenai Medical Center Emergency Room, and reported that her bilateral hip pain began one and one-half months earlier, and had continued intermittently. Emergency Room physician Eric Chun, M.D., recorded that Claimant "has had gradual onset of pain in the paralumbar back over the past month and a half. She notes no inciting event, but does lots of bending and lifting while at her work. She notes this makes it worse." Exhibit C, p. 6. Dr. Chun further noted there was "consideration that this is occupational

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medicine related.” Id. The work status summary provided by Occupational Health noted that Claimant’s primary medical doctor felt this was a repetitive work injury. Exhibit C, p. 8.

10. On April 19, 2005, Claimant was evaluated for participation in physical therapy. Her chief complaint to the physical therapist was low back pain starting around the beginning of March. There is no mention of a work injury.

11. Claimant’s job duties changed after seeking medical attention. Claimant began bagging groceries and subsequently moved to night crew where she placed product on the shelves.

12. On April 27, 2005, Claimant presented for recheck at the Kootenai Medical Center. David Barnes, M.D, noted that Claimant “does not recall any distinct activity or injury that caused her low back pain. It sounds as though it was more gradual in onset, and she does describe lifting consistently at work.” Exhibit C, p. 14.

13. On May 16, 2005, Claimant underwent an MRI, which showed an L5-S1 disk protrusion and likely annular tear.

14. Claimant apparently inadvertently misled a number of her medical providers by incorrectly describing her lifting activities at work in terms of lifting 40, 80, and 120 pound mixing bowls. In actuality she worked with 40 and 80-quart capacity mixing bowls. The 120-quart capacity bowl is on a base and need not be lifted. The 80-quart capacity mixing bowl is lifted on occasion and weighs 33 pounds.

15. On July 8, 2005, Claimant was notified that her job was terminated because she was unable to fulfill her job duties. Claimant was advised that she could come back when she was better if there was an opening. Claimant has not worked since July 8, 2005.

16. On September 14, 2005, Claimant filed her Complaint alleging a March 1, 2005, date

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of injury. Claimant later filed an Amended Complaint alleging March 15, 2005, as the date of injury. At hearing Claimant testified her injury occurred on March 16, 2005.

17. At the time of hearing, Claimant continued to suffer back pain. She noted pain with extended sitting, and bending. Claimant is now able to sit about thirty to sixty minutes. She is able to comfortably lift 10 pounds.

18. Having observed Claimant at hearing, and carefully examined the record herein, the Referee finds Claimant an unreliable historian.

DISCUSSION AND FURTHER FINDINGS

19. **Accident.** The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

20. Claimant's testimony regarding the occurrence of an alleged March 16, 2005, industrial accident contains several inconsistencies. Since April 19, 2005, Claimant has alleged three different dates for her injury: March 1, 15, and finally 16, 2005. Claimant testified that her back pain commenced on that day while lifting mixing bowls during cleanup, however she later indicated it began while lifting cookies sheets. Claimant testified that cleanup started at 4:00 p.m., but she testified she first noticed her back pain prior to her break—which her time card establishes she took on March 16, 2005, from 3:37 to 3:51 p.m.—before cleanup. Claimant testified that she was alone in the bakery when her accident occurred and that she did not tell Wimmer until the next

day because Wimmer was not present at the time of the accident. However, Wimmer worked March 16, 2005, until 5:08 p.m.—over an hour after Claimant returned from her break during which she testified she noticed back pain.

21. Disputes regarding notice of the alleged industrial accident further undermine the credibility of Claimant's account. Claimant testified she notified Wimmer of her back injury the day after it occurred in March 2005. However, Wimmer denied such notice and testified that Claimant first advised her of a work accident the day she went to the hospital, which was April 19, 2005.

22. The medical records of Julia Mangan, FNP, whom Claimant saw first after her alleged accident, fail to mention any report of an alleged work related cause for Claimant's back complaints. The records of Drs. Chun and Barnes, whom Claimant saw next for treatment of her back pain, specifically note that Claimant talked about lifting at work but could not identify any specific inciting event. These medical records also place the approximate date of Claimant's alleged injury more than two weeks before March 16, 2005.

23. In addition to Wimmer's testimony, the testimony of another Super 1 Foods employee, Peggy Wallace, refutes Claimant's account. Wallace, head decorator at Super 1 Foods and a coworker of Claimant, testified that Claimant told her that Claimant hurt her back when she twisted while helping load her husband's motorcycle on the back of a truck during her spring break in 2005. Wallace testified this conversation occurred in the bakery out of earshot of Wimmer. Claimant did not present any rebuttal to Wallace's testimony on this matter. Wallace indicated Claimant spoke of spring break plans to visit the Oregon coast, whereas Claimant and her husband testified they went to Orofino to fish for steelhead. Neither explanation necessarily excludes Claimant's involvement in loading her husband's motorcycle.

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24. Although Wallace and Wimmer work for the Employer, they had no apparent personal stake in supporting or refuting Claimant's assertions of a work accident. They could have easily acknowledged Claimant's report of a work accident several weeks earlier, if in fact Claimant provided such.

25. The Referee is not persuaded that either of Claimant's coworkers was fabricating when affirming Claimant did not report her alleged work injury until April 19, 2005, or when affirming Claimant reported hurting her back while helping load her husband's motorcycle. The Referee finds unpersuasive Claimant's testimony alleging an industrial accident on or about March 16, 2005.

26. Claimant has failed to prove she suffered an industrial accident on or about March 16, 2005.

27. All other issues are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to prove she suffered an accident arising out of and in the course of her employment on or about March 16, 2005.

2. All other issues are moot.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own, and issue an appropriate final order.

DATED this 25 day of August, 2006.

INDUSTRIAL COMMISSION

/s/ _____
Alan Reed Taylor, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 11 day of September, 2006, a true and correct copy of **Findings of Fact, Conclusions of Law, and Recommendation** was served by regular United States Mail upon each of the following:

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jc

/s/ _____